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No. 91-577

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BONITA PASCHAL, DANIEL DODSON, PAUL BUCASAS and all others similarly situated,

Petitioners,

v.

LOLETA DIDRICKSON, the Director of the Illinois Department of Employment Security; STELLA CUTHBERT, the Commissioner of the Illinois Department of Employment Security; LYNN MARTIN, the Secretary of the United States Department of Labor; ROBERTS T. JONES, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Eleventh Amendment to the United States Constitution allow a judgment for restitution of funds against a State to persons whose claims for unemployment benefits have been resolved and closed?

2. Should *Hans v. Louisiana*, 134 U.S. 1 (1890), be overruled?

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STATEMENT OF THE CASE

Petitioners' statement of the case is clouded by argument and a basic misunderstanding of unemployment insurance law. The State of Illinois Respondents, Loleta Didrickson, the Director of the Illinois Department of Employment Security (the "Director" and the "IDES"), and Stella Cuthbert, the Commissioner of Unemployment Insurance of the IDES, can agree with the Petitioners' statement of the case, except as stated below.

I. THE STATUTORY FRAMEWORK

A. The Two Unemployment Insurance Programs At Issue

This case indeed concerns extended benefits and federal supplemental compensation benefits. Some general background in unemployment insurance is necessary for a full understanding of the case.

Unemployment insurance is surely a cooperative effort by the federal and state governments. Spawned by the passage of the Social Security Act, 42 U.S.C. §§ 501 *et seq.*, in the depression years, unemployment insurance was never intended to be, and it is not, a federal program. Rather, the states were induced to pass their own unemployment programs, and every state has done so. *See* Bernstein and Ramel, *The Illinois Unemployment Insurance Act*, 48 Ill.Ann.Stat., XIII, XIV (Smith-Hurd 1986).

The federal government does retain input into the state programs through various requirements. These requirements are generally designed to safeguard the state funds from which benefits are paid, solidify labor standards, and to help ensure efficiency in administration of unemployment programs. Bernstein and Ramel, 48 Ill.Ann.Stat. at XIX. Notwithstanding this, however, the states have wide

discretion in the administration of their unemployment insurance programs. *Id.* at XVII.

In Illinois, a claimant can receive, in each benefit year, a maximum amount in regular benefits equal to 26 times his weekly benefit amount plus dependency allowances, or to the total wages for insured work paid to the claimant during his base period, whichever is less. Ill. Rev. Stat. 1989, ch. 48, par. 403B. Regular benefits are those payable pursuant to the Illinois Unemployment Insurance Act (the "Act"), Ill. Rev. Stat. 1989, ch. 48, pars. 300 *et seq.*, or any other state unemployment law, other than extended benefits or additional benefits. *Id.* par. 409A.5.

Extended benefits ("EB") are payable pursuant to the various unemployment laws of each state, and not through a federal law. Similar to the "regular" unemployment program, the states were induced to pass the EB program through the enactment of federal legislation. In the case of EB, this was the passage of the Federal-State Extended Unemployment Compensation Act of 1970 ("EUCA"), 26 U.S.C. § 3304(a)(11), note Pub. L. 91-373, (as amended) §§ 201-207.

In Illinois, EB are those payable pursuant to section 409 of the Act. Ill. Rev. Stat. 1989, ch. 48, par. 409A.6. EB are only available when adverse economic conditions trigger an indicator "on," and end when conditions improve so as to switch EB "off." *Id.* par. 409A.1,2,3. The indicator has not been "on," and EB have not been payable in Illinois, since June, 1983. When "on," the Act provides for up to 13 weeks of extended benefits to exhaustees of regular benefits. *Id.* par. 409C,F.

Federal supplemental compensation ("FSC") benefits were payable pursuant to the Federal Supplemental Compensation Act of 1982 (the "FSC Act"), 26 U.S.C. § 3304,

note Pub. L. 97-248, (as amended) §§ 601-606. FSC benefits were paid by states, including Illinois, that entered into a contract to do so. FSC Act, § 602(a).

B. The Funding of Unemployment Insurance Benefits

Contrary to Petitioners' assertions, unemployment insurance benefits are not paid from the unemployment trust fund. Rather, in each state they are paid from state moneys or funds. In Illinois, they are paid from moneys assessed and collected from Illinois liable employers. Ill. Rev. Stat. 1989, ch. 48, par. 660. To be sure, the benefits moneys pass *through* the unemployment trust fund, but that is due to the nature and history of unemployment insurance.

In Illinois, unemployment insurance programs are administered through the IDES by the Director. Ill. Rev. Stat. 1989, ch. 48, par. 610. Unemployment benefits are funded by the assessment of contributions against Illinois liable employers. *Id.* pars. 550-581, 660; *People ex rel. Bernardi v. Bethune Plaza, Inc.*, 124 Ill. App.3d 791, 464 N.E.2d 1116, 1119 (1st Dist. 1984), *cert. denied*, 470 U.S. 1001 (1985); Bernstein and Ramel, 48 Ill. Ann. Stat. at XVIII.

All unemployment benefits, of whatever type, are paid by the IDES from these moneys so collected. Ill. Rev. Stat. 1989, ch. 48, par. 660. These moneys are first deposited by the Director into the "clearing account," one of the accounts maintained in the state's treasury for the administration of the unemployment insurance program. *Id.* pars. 660, 663.

After clearance, the Director deposits the moneys with the U.S. Secretary of the Treasury to the credit of Illinois' account in the unemployment trust fund. Ill. Rev.

Stat. 1989, ch. 48, par. 660; *see* 42 U.S.C. §§ 503(a)(4), 1104; 26 U.S.C. § 3306(f). Even though these moneys are deposited in a federal trust fund, they are kept in Illinois' account within that fund; until they are requisitioned by the IDES for the payment of benefits, they at all times are and "shall be deemed to be a part of the unemployment fund of the State [of Illinois]." 26 U.S.C. § 3306(f).

Unemployment benefits are paid from the "benefit account." Upon the requisition of the Director, money is transferred from Illinois' account in the federal unemployment trust fund to the benefit account. Ill. Rev. Stat. 1989, ch. 48, par. 660; *see* 42 U.S.C. § 1104(f); 26 U.S.C. § 3306(f).

If and when the federal unemployment trust fund ceases to exist, or separate accounts for each state are not maintained, Illinois' money in the fund shall immediately be transferred back to the Illinois State Treasurer to be held and used for unemployment benefits. Ill. Rev. Stat. 1989, ch. 48, par. 662.

If Illinois' moneys, in either the benefit account or in its account in the unemployment trust fund, are insufficient to pay benefits, Illinois may request an advance, *i.e.* borrow, from the U.S. Secretary of Labor. Ill. Rev. Stat. 1989, ch. 48, par. 660C. While the advance is repaid from Illinois' account in the unemployment trust fund, interest on the advance is payable from other state moneys. 42 U.S.C. § 1322(b)(5); *see* 42 U.S.C. § 503(c)(3); 26 U.S.C. §3304(a)(17).

The costs of administering an unemployment insurance program in Illinois are paid from either the "special administrative account" or the Title III Social Security and Employment Fund. Ill. Rev. Stat. 1989, ch. 48, pars. 661, 663.

The special administrative account consists of moneys collected by the IDES as and for interest and penalties from employers pursuant to the Act. Ill. Rev. Stat. 1989, ch. 48, par. 661; *see also id.* pars. 551-552. These moneys are used for certain administration costs and for various other purposes. *Id.* par. 661A-I.

Other administrative costs are paid through the Title III Social Security and Employment Fund. *Id.* par. 663. This fund receives moneys from the federal government.

At least part of the moneys raised by the federal government pursuant to the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301 *et seq.*, is appropriated by Congress to the employment security administration account in the unemployment trust fund. 42 U.S.C. § 1101(b)(1). Subject to that appropriation, moneys in that account are used "for the purpose of assisting the states in the administration" of their unemployment programs. 42 U.S.C. § 501.

The amount of money allocated to each state is such as the U.S. Secretary of Labor in her discretion "determines to be necessary for the proper and efficient administration" of the state's unemployment program during that fiscal year. 42 U.S.C. § 502; *see People ex rel. Bernardi v. Bethune Plaza, Inc., supra*, 464 N.E.2d at 1119. There is no requirement that these moneys be all or even a substantial portion of that necessary to run that state's program.

The EB program is a state unemployment program. EB are paid by the IDES out of its benefit account. Ill. Rev. Stat. 1989, ch. 48, par. 660. Pursuant to EUCA, § 204(a)(1)(A), the federal government reimburses Illinois for one-half of the EB it pays. Similar to regular benefits, Illinois is "assist[ed]" in meeting its EB administrative costs. *See* 42 U.S.C. §§ 501, 502, 1101(c)(1)(A)(i).

The IDES paid FSC benefits out of the benefit account, too. Ill. Rev. Stat. 1989, ch. 48, par. 660. Pursuant to the FSC Act, § 603(a), the federal government reimbursed Illinois for the FSC benefits it paid. The IDES also received some federal assistance for its administrative costs. *Id.* § 604(c).

II. THE DISPOSITION OF THE CASE BELOW

No court has ever made a final determination that the IDES violated the constitutional or statutory rights of the Petitioners or the classes they represent. Admittedly, the court of appeals in the first appeal did make a preliminary finding that the IDES violated the claimants' due process rights regarding notice of issues. *Cosby v. Ward*, 843 F.2d 967, 985-986 (7th Cir. 1988). But the trial was never finished to allow the IDES to rebut the evidence offered by the Petitioners. The IDES continues to strongly contest that finding.

The Partial Settlement Order did provide for other than prospective relief to a certain number of individuals. Those claimants whose unemployment benefit claims remained pending before a court or administrative agency had those claims remanded to and decided by the IDES. *Cosby v. Jackson*, 741 F. Supp. 740, 741 (N.D. Il. 1990); App. 531-533.

Petitioners mischaracterize the court of appeals decision, artfully spinning their arguments to that court into the courts holding. Petition at 18-22.

Thus, while the court did admit to "ample authority that recognizes that a lawsuit is not against a sovereign when the relief has no impact upon the state itself," App. 15, it did not agree with Petitioner's argument that the relief sought here would have "no impact." To the contrary,

the court recognized that all benefits, including EB and FSC benefits, are paid from Illinois' benefit account. App. 9, 12. The moneys in the benefit account are state funds. The court of appeals not only rejected the "trust fund doctrine," it rejected the attempt to bring this case into that doctrine.

Moreover, the court of appeals quite properly ignored the attempted distinction of two precedents from this Court, *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946) and *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944). The Petitioners make much of the "segregation" of unemployment moneys from the "general revenues" of the state, whatever that term may mean. That the unemployment moneys are held in separate accounts is not relevant to their character as state moneys; they merely are not "commingled with *other* state funds" (emphasis added). Ill. Rev. Stat. 1989, ch. 48, par. 660; App. 8. The lesson of *Kennecott* and *Great Northern* is that mere segregation is an "immaterial difference;" the important question is whether a judgment would be against the state. App. 20.

Finally, Petitioners again mischaracterize the court of appeals' decision when they state that the court acknowledged that any judgment would not come from "the state's revenues at all." Petition at 22. To the contrary, the court acknowledged that EB and FSC benefits come from Illinois' benefit account. App. 8-9, 12. These are state funds.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT'S RULING IS IN ACCORD WITH PRECEDENTS FROM THIS COURT

The key point in the Petitioners' argument for review by this Court is that the money used to pay unemployment benefits in Illinois are kept in separate accounts in the Illinois treasury. That is, they are "segregated" from other state moneys, which Petitioners refer to as the state's "general revenues." The argument proceeds that only these "general" moneys of the state are protected by the immunity given by the Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI. All "segregated" moneys, Petitioners claim, are amenable to judgment.

The court of appeals rejected that argument. App. 19. In that regard, the Seventh Circuit ruled in strict accordance with two longstanding precedents of this Court. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

In both of those cases the moneys at issue were segregated from the state's other funds. The Court held it to be an "immaterial difference" that the moneys were segregated, when the judgment would run against the state. *Great Northern*, 322 U.S. at 53.

Pointedly, the Seventh Circuit followed this Court's rulings in *Kennecott Copper* and *Great Northern*, App. 19. So did the Tenth Circuit in *Esparza v. Valdez*, 862 F.2d 788, 794 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989), a case very similar to the one at bar. In *Esparza*, the court also rejected the claim that the segregation of moneys to pay unemployment benefits took the case out from under the protection of the Eleventh Amendment, on the authority of *Kennecott Copper* and *Great Northern*.

In contrast, *none* of the alleged conflicting authorities cited on pages 24-26 of the Petition even refer to *Kennecott Copper* or *Great Northern*. It is those circuits which have ignored this Court's holdings on this point, and not the Seventh Circuit. There is simply no reason for this Court to review this case on this issue.

Petitioners also argue that the review of this Court is needed because the Seventh Circuit ignored the source of the moneys used to pay the unemployment benefits at issue here. Petitioners claim that the moneys used to fund unemployment benefits are federal, and not state, and therefore that sovereign immunity does not attach to them. In this regard, the ruling of the Seventh Circuit is said to conflict with precedents of this Court, Petition at 28-31, and cases from other circuits, Petition at 22-24.

This argument ignores two important differences in the case at bar. First, the clear and obvious fact is that all unemployment benefits in Illinois, including the EB and FSC benefits, are paid from *state* moneys, collected from Illinois employers and held in the benefit account in the state treasury. Ill. Rev. Stat. 1989, ch. 48, par. 660. The Seventh Circuit recognized this point. App. at 9, 12. The Petitioners have repeatedly failed to grasp it.

Second, as the court of appeals also recognized, a key point is that any judgment in this case would run against the State of Illinois. App. at 18; *see Edelman v. Jordan*, 415 U.S. 651, 665 (1974). Furthermore, such judgment "could have an impact on the state [of Illinois] treasury." App. at 18-19; *see Edelman*, 415 U.S. at 666, and n.11.

Therefore, the decision of the court of appeals here does not depart from the prior rulings of this Court, or differ

from decisions in other circuits, so as to merit further review by this Court.

II. *HANS v. LOUISIANA* SHOULD NOT BE OVERRULED

Petitioners seek to use this case as a vehicle to overrule *Hans v. Louisiana*, 134 U.S. 1 (1890). Several times in the recent past, this Court has reconsidered, but declined to overturn *Hans*. *E.g. Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Welch v. Texas State Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Petitioners have offered no new or compelling reasons for this Court to again consider *Hans*.

Indeed, Petitioners raise many of the same points, and refer to many of the same authorities, as have been raised before to this Court. *See, e.g. Pennsylvania v. Union Gas Co., supra*, 491 U.S. at 23 (Stevens, J. concurring). Thus, the Petitioners argue over the express terms of the Eleventh Amendment and the precise facts of the *Hans* case. Petition at 32-33, 35-37. They claim that the Court's decisions under *Hans* have created "substantial incoherence in the constitutional jurisprudence of sovereign immunity." Petition at 42. Again, Petitioners miss the point.

First, it is not clear that only *state* law claims are included within the immunity afforded by the Eleventh Amendment. To the contrary, the text of the amendment prohibits "*any* suit in law or equity." U.S. Const. amend. XI (emphasis added). This would include federal question suits. *Welch v. Texas Department of Highways and Public Transportation, supra*, 483 U.S. at 485.

Second, the significance of *Hans* lies not in its specific facts or the precise way that Louisiana was brought into

court. *Hans* was, and is, reflective of the concerns of the states. *Hans* was "enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the states retained their sovereign prerogative of immunity." *Pennsylvania v. Union Gas Co., supra*, 491 U.S. at 37 (Scalia, J., concurring in part and dissenting in part). The best answer to Petitioners' argument is perhaps found in *Hans* itself, 134 U.S. at 15:

> Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

Third, there is no incoherence in this Courts' sovereign immunity rulings. To the contrary, "the fundamental principle enunciated in *Hans* has been among the most stable in [this Court's] constitutional jurisprudence." *Welch v. Texas Department of Highways and Public Transportation, supra*, 483 U.S. at 486; *see Employees v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring in result).

Furthermore, the Petitioners' proposed solution—to allow suits against a state by its own citizens based on a federal question, and regardless of the type or nature of the relief sought—creates problems for the courts, the state governments and the federal government that far outweigh any purported benefit.

Thus, at a time when the federal courts are looking for ways to cut already crowded dockets, this "solution" would have the opposite effect. It would increase the caseload by allowing for lawsuits now barred from federal court.

Moreover, this is a time when governments of all types and levels are looking for ways to increase revenues, while avoiding additional tax levies and unexpected outlays of cash. Petitioners' proposal would frustrate this goal, and expose state governments to additional, unforeseen, and unbudgeted liability. To further exacerbate the situation, this liability would often impact the government after years of litigation—and years after the alleged violations have occurred.

Finally, Petitioners' "solution" would further strain the relationship between the federal and state governments. These two are often at loggerheads over revenues. To now allow federal suits against unconsenting states that may result in large monetary judgments against those states would assuredly further stress that relationship. Such judgments would need to be enforced, and this would again raise the "delicate problem of enforcing judgments against the states." *Welch v. Texas Department of Highways and Public Transportation*, *supra*, 483 U.S. at 482.

Accordingly, the State of Illinois Respondents submit that still another review of *Hans v. Louisiana* is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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